

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANTOLIN ANDREW MARKS,

Plaintiff,

v.

UNITED STATES OF AMERICA *et al.*,

Defendants.

Case No. C07-5395RBL

REPORT AND
RECOMMENDATION

**NOTED FOR:
September 21, 2007**

This 42 U.S.C. § 1983/Bivens action has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 (b) and local Rules MJR 3 and 4. Plaintiff has filed a proposed complaint and applied for *in forma pauperis* status (Dkt. # 1). Plaintiff is incarcerated at the Northwest Detention Center and is going through the process of deportation proceedings. In the last two years Mr. Marks has filed sixteen actions in this court and has proceeded *in forma pauperis* in those actions. Six of those actions have been dismissed and ten are currently pending before the court. In the month of July Mr. Marks filed four actions.

The court has reviewed this application to proceed *in forma pauperis* (Dkt. # 1). The court has also screened the complaint pursuant to 28 U.S.C. 1915 § (e)(2)(B). The court recommends *in*

1 *forma pauperis* status be denied for two reasons. The first reason for denial is that Mr. Marks has
 2 \$811 dollars in checks and money orders available to him. Thus, he is not indigent. The second
 3 reason is that several of the causes of action in the proposed complaint are duplicative of previously
 4 dismissed claims in other actions, claims that are currently pending, or are claims that could have
 5 been brought in the other actions. Thus, the claims are frivolous and malicious as defined by cases
 6 interpreting 28 U.S.C. 1915 § (e)(2)(B).

7 The first reason for denial is relatively simple. Review of his application to proceed *in forma*
 8 *pauperis* reveals that Mr. Marks has \$811.40 in his personal property in the form of uncashed checks
 9 and money orders. Thus, he is not indigent (Dkt. # 1). The district court may permit indigent
 10 litigants to proceed *in forma pauperis* upon completion of a proper affidavit of indigence. See 28
 11 U.S.C. § 1915(a). However, the court has broad discretion in denying an application to proceed in
 12 *forma pauperis*. Weller v. Dickson, 314 F.2d 598 (9th Cir. 1963), *cert. denied*, 375 U.S. 845
 13 (1963).

14 Based on the above, the Court should deny plaintiff's application to proceed *in forma pauperis*.
 15 Plaintiff has not shown that is unable to pay the full filing fee to proceed with his lawsuit. The court
 16 should direct Mr. Marks to pay the filing within 30 days of the court's order and if he fails to pay the
 17 filing fee the clerk should be directed to dismiss this matter.

18 The second reason for denial is Mr. Marks raising causes of action that have been dismissed,
 19 are currently pending, or could have been brought in prior litigation. Mr. Marks titles his proposed
 20 73 page complaint "Everything and the Kitchen sink Bivens complaint" (Dkt. #1, proposed
 21 complaint). The title reflects Mr. Marks attempt to place a number of issues before the court.
 22 Several of those issues have, or could have been litigated in prior actions. One of the claims Mr.
 23 Marks attempts to litigate is his attempt to send legal mail, 285 letters, to congress persons (Dkt. # 1,
 24 proposed complaint, page 2 to 15). This is the same issue Mr. Marks raises in Marks v Bennett et
 25 al., 07-CV-5372RBL/JKA. Mr. Marks raises a claim alleging denial of confidential telephone calls
 26 to counsel , and an inability to contact possible counsel using toll free numbers (Dkt. # 1, proposed
 27 complaint pages 22 to 25 and pages 41 to 45). This issue is currently pending in Hopper/Marks v.

1 Myers, 05-CV-5680RBL/JKA. Finally, Mr. Marks again raises issues surrounding the alleged
2 confiscation of birth certificates he attempted to obtain. He raises this claim as “wrongful
3 imprisonment” (Dkt. # 1, proposed complaint, pages 35 to 40). Mr. Marks raised and litigated issues
4 concerning his birth certificate in Hopper/Marks v. Clark et al., 06-CV-5282RBL.

5 A complaint is malicious when it duplicates allegations of another pending federal lawsuit.
6 Pittman v. Moore, 980 F.2d 994, 995 (5th Cir. 1993). The reason the complaint is considered
7 malicious is because the court and defendants are forced to address claims and issues that are already
8 before the court.

9 Further, if a claim has been litigated and lost, or could have been raised under the facts of a
10 prior action and was not, raising the claim in a subsequent action is also malicious. Rein v. Providian
11 Financial Corp., 270 F.3d 895 (9th Cir. 2001). The doctrine of res judicata precludes the court from
12 reaching the claim on the merits and there can be no proper purpose in bringing the claim a second
13 time.

14 Denial of *in forma pauperis* status is reviewed *de novo*. If amendment could cure the defect
15 amendment should be allowed. Here, one of the defects is plaintiff’s moving to apply when he has
16 funds in the form of checks and money orders in his personal property. Amendment would be futile.
17 The court recommends *in forma pauperis* status be **DENIED**.

18 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,
19 the parties shall have ten (10) days from service of this Report to file written objections. *See also*
20 Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of
21 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule
22 72(b), the clerk is directed to set the matter for consideration on **September 21, 2007**, as noted in
23 the caption.

24 DATED this 28 day of August, 2007.

26 /S/ J. Kelley Arnold
27 J. Kelley Arnold
28 United States Magistrate